

120 FERC ¶ 61,272
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

CALifornians for Renewable Energy, Inc.

v.

Docket No. EL07-49-000

California Public Utilities Commission,
California Department of Water Resources,
Pacific Gas and Electric Company, and
City and County of San Francisco

CALifornians for Renewable Energy, Inc.

v.

Docket No. EL07-50-000

California Public Utilities Commission,
Southern California Edison Company, and
Blythe Energy, L.L.C.

(Not Consolidated)

ORDER DISMISSING COMPLAINTS

(Issued September 24, 2007)

1. In this order, we address two virtually identical complaints filed by CALifornians for Renewable Energy, Inc. (CARE) seeking Commission review and rejection of certain wholesale contracts. One of the contracts at issue is a long-term, market-based rate contract entered into by parties in the California market; the other is a long-term contract entered into by a state entity and a municipality, the operational responsibility under which was subsequently allocated to an investor-owned utility upon a directive from the California Public Utilities Commission (CPUC). In this order, we find that CARE has

mischaracterized the relevant case law¹ as invalidating the Commission's market-based rate program. We also find that the Ninth Circuit decisions do not require all market-based rate transactions to be pre-filed at or approved by the Commission. CARE has also provided no factual support for the allegations that the challenged contracts are unjust and unreasonable. In addition, we find that the Commission proceeding is not a proper forum to challenge a contract between two non-jurisdictional entities. Accordingly, we dismiss the complaints.

CARE's Complaints

2. In the Docket No. EL07-49-000 complaint, CARE seeks to abrogate a CPUC-approved allocation of a contract between the California Department of Water Resources (CDWR) and the City and County of San Francisco (San Francisco) to Pacific Gas & Electric Company (PG&E).² In the Docket No. EL07-50-000 complaint, CARE challenges another CPUC action establishing a hearing proceeding regarding Southern California Edison Company's (SoCal Edison) application to enter into a power purchase agreement with Blythe Energy, LLC (Blythe). Both complaints present largely identical arguments and raise largely identical issues.

3. Specifically, CARE argues that a series of decisions by the Ninth Circuit have "effectively gutted FERC's decade-old approach to bulk power markets,"³ leaving market-based rate contracts with "no presumption of legality." CARE argues that the court decisions in *Snohomish* and *CPUC* expanded an earlier court decision in *Lockyer* "to erode further the price certainty of market-based sales and make new and ineluctably fatal demands of FERC's market-based pricing program."⁴ According to CARE, the court in *Snohomish* and *CPUC* held that a wholesale power purchase contract pursuant to

¹ CARE refers to the following recent decisions by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (*Snohomish*); and *Pub. Util. Com'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC*); *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*).

² Under the contract allocation, PG&E assumed CDWR's obligations under the contract at issue for operational purposes. The allocation of contract is contingent upon certain future acts, such as San Francisco's Board of Supervisors' approval and expiration of CDWR's right to terminate the contract at issue.

³ CARE Complaint, Docket No. EL07-49-000, at 4.

⁴ CARE Complaint, Docket No. EL07-50-000, at 4.

the Commission's market-based rate program enjoys no *Mobile-Sierra*⁵ price certainty unless the contract is presented in advance to the Commission for review and the Commission considers market conditions and determines that the rate is just and reasonable and was negotiated in a functional marketplace.

4. CARE therefore concludes that the contracts at issue (which were not filed with or reviewed by the Commission) violate the filed rate doctrine which, CARE argues, requires that rates must be filed and approved by the Commission and formally noticed 60 days in advance of commencement of services.

5. CARE further states that the contracts in question must be abrogated as unjust and unreasonable. CARE argues that in addition to unreasonable pricing, the non-price terms and conditions of the contracts are unjust and unreasonable, and warrant contract abrogation. CARE adds that the prices, terms, and conditions in the challenged contract are tainted with the exercise of market power. In the alternative, CARE states that the Commission must reform the contracts to provide for just and reasonable pricing, reduce the duration of the contract, and strike from the contract the specific non-price contract terms and conditions found to be unjust and unreasonable. CARE also alleges that the contracts at issue impose a financial burden on ratepayers and pose a threat to reliability.

6. In addition, in the Docket No. EL07-49-000 complaint, CARE states that it seeks Commission review of the CPUC's decision approving the contract in question because the CPUC failed to properly address the Commission's regulatory authority over review of wholesale electricity contracts in violation of the Federal Power Act (FPA).⁶

7. Subsequently, CARE supplemented its original complaints to provide further information concerning the bases for the complaints.⁷ Specifically, in two amendments to the original complaint in Docket No. EL07-49-000, CARE states that the challenged contract was approved by the CPUC on March 27, 2001, which was in the midst of the 2000-2001 energy crisis in California. CARE further argues that the contract at issue should be reviewed by the Commission for resource adequacy in the region because the Commission has jurisdiction over resource adequacy determinations by non-public

⁵ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power*, 350 U.S. 348 (1956) (*Sierra*).

⁶ 16 U.S.C. §§ 796, *et seq.* (2004).

⁷ On April 24, 2007, CARE filed the First Amended Complaint in Docket No. EL07-49-000. On June 1, 2007, the Second Amended Complaint was filed. In Docket No. EL07-50-000, CARE filed the First Amended Complaint on May 1, 2007.

utilities.⁸ In Docket No. EL07-50-000, CARE also argues that there are alternative locations for the construction of the proposed facility and that the CPUC has neglected the energy efficiency program but instead has sited a new power plant on an emergency basis.

Notice of Filings, Motions to Intervene, and Responsive Pleadings

8. Notice of CARE's complaint in Docket No. EL07-49-000 was published in the *Federal Register*, 72 Fed. Reg. 14,093 (2007), with interventions and protests due on or before April 5, 2007. The CPUC filed an answer, motion to dismiss, and conditional notice of intervention, the City of San Francisco (San Francisco) filed a motion to dismiss, motion to intervene, and conditional answer, CDWR filed an answer and motion to dismiss, and PG&E file a motion to intervene and answer. Timely motions to intervene and comments were filed by Reliant Energy, Inc. (Reliant), and jointly by the Electric Power Supply Association (EPSA). The California Electricity Oversight Board (CEOB) and the NRG Companies (NRG)⁹ each filed timely motions to intervene.

9. Notice of CARE's First Amended Complaint was published in the *Federal Register*, 72 Fed. Reg. 29,494 (2007), with interventions and protests due on or before May 31, 2007. San Francisco, the CPUC and CDWR filed answers to the First Amended Complaint. The CPUC and CDWR also filed motions to dismiss. Notice of CARE's Second Amended Complaint was published in the *Federal Register*, 72 Fed. Reg. 32,845 (2007), with interventions and protests due on or before June 21, 2007. San Francisco and CPUC filed answers to the Second Amended Complaint. The CPUC also filed a motion to dismiss.

10. Notice of CARE's complaint in Docket No. EL07-50-000 was published in the *Federal Register*, 72 Fed. Reg. 15,681 (2007), with interventions and protests due on or before April 16, 2007. The CPUC filed an answer, motion to dismiss, and conditional notice of intervention. SoCal Edison and Blythe filed answers to the complaint.¹⁰

⁸ In support of this assertion, CARE cites to *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 550 (2007).

⁹ NRG Companies include NRG Power Marketing, Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, and Long Beach.

¹⁰ SoCal Edison titled its filing "Southern California Edison Company's Protest to CARE's Section 206 Complaint." Because SoCal Edison was a named Respondent in CARE's Complaint, the Commission considers SoCal's filing as an answer to the Complaint.

Reliant and EPSA filed timely motions to intervene and comments. The CEOB and NRG each filed timely motions to intervene.

11. Notice of CARE's First Amended Complaint in Docket No. EL07-50-000 was published in the *Federal Register*, 72 Fed. Reg. 29,494 (2007), with interventions and protests due on or before May 31, 2007. The CPUC, SoCal Edison, and Blythe filed answers to the First Amended Complaint.

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), timely, unopposed motions to intervene serve to make the movants parties to these proceedings.

Answers to the Complaints

13. The CPUC states that CARE has no legal basis to file a complaint against the CPUC, which is a constitutionally-established state agency. The CPUC further states that the Commission has no jurisdiction over the CPUC's decisions under section 201(f) of the FPA.¹¹ In support, the CPUC cites instances where the Commission has relied upon section 201(f) to dismiss complaints against state agencies.¹² According to the CPUC, CARE's complaints are also barred by the state sovereign immunity doctrine.¹³ In its answers to the First and Second Amended Complaints in Docket No. EL07-49-000, the CPUC generally reiterates the same arguments. In its answer to the First Amended Complaint, CDWR also argues that CARE's complaint is procedurally deficient and thus should be dismissed.

14. San Francisco states that under section 201(f), CDWR is beyond the Commission's jurisdiction for purposes of FPA sections 205 and 206. San Francisco also argues that the Commission lacks jurisdiction over the contract between San Francisco and CDWR because neither San Francisco nor CDWR is a jurisdictional entity.¹⁴

¹¹ 16 U.S.C. § 824(f) (2004).

¹² CPUC cites to *Wis. Pub. Power, Inc. SYS. v. Wis. Pub. Serv. Corp.*, 83 FERC ¶ 61,198, at 61,855 (1998); *Pac. Water & Power, Inc. v. State of Cal.*, 51 FERC ¶ 61,080, at 61,179-80 (1990).

¹³ CPUC cites to *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).

¹⁴ San Francisco cites to *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*).

According to San Francisco, the Commission cannot grant the relief CARE requests¹⁵ under section 206 of the FPA because San Francisco is a municipality, and not a public utility under the FPA. In its answer to the amended complaints in EL07-49-000, San Francisco states that the Commission's jurisdiction to direct all load serving entities, including non-jurisdictional ones, to maintain adequate resources does not extend to regulating power sales between non-jurisdictional entities.

15. In its answer to CARE's complaint in Docket No. EL07-50-000, the CPUC points out that it has not yet conducted hearings on SoCal Edison's application, let alone issued a decision that is the supposed subject of CARE's complaint. CDWR states that CARE's argument that the Commission should abrogate the contract must fail because the price, terms and conditions are not fully negotiated. The CDWR queries how the Commission can determine the justness and reasonableness of a rate that has yet to be fixed by contract.

16. The CPUC states that CARE has failed to provide evidence or any specific allegations as to why these purchase power agreements are not necessary and why the rates, terms, and conditions are unjust and unreasonable. The CPUC, SoCal Edison, PG&E, San Francisco, and CDWR state that CARE's complaint fails to meet the filing requirements of a complaint under Rules 203 and 206 of the Commission's Rules of Practice and Procedure,¹⁶ which require, *inter alia*, that a complaint state the specific relief or remedy requested, the basis for that relief, and the relevant facts with supporting documents.

17. According to SoCal Edison, CDWR, San Francisco, Blythe and the CPUC, CARE is unclear what relief it seeks, presents no facts in support of its claims that the challenged contracts are unjust and unreasonable, never explains how the contracts are tainted with the exercise of market power¹⁷ or what market conditions have caused them to be tainted, requests different and inconsistent types of relief, does not allege the basis for abrogation, and contains no attached documents or affidavits supporting CARE's

¹⁵ CARE requests that the Commission compel PG&E to file the CDWR – San Francisco contract with the Commission for its review and that the Commission should abrogate or reform the contract.

¹⁶ 18 C.F.R. §§ 385.203, 385.206 (2007).

¹⁷ In particular, Blythe states that the fact that it participated in a competitive and publicly reviewed bidding process sharply undercuts CARE's challenge to the contract at issue in Docket No. EL07-50-000. Blythe also states that CARE failed to allege any irregularities or deficiencies in the bidding, procurement or approval of Blythe as successful bidder.

general factual allegations. Furthermore, the CPUC, SoCal Edison, Blythe, and San Francisco state that Commission precedent dictates that the Commission dismiss CARE's complaint for making merely conclusory allegations and for failure to proffer evidence,¹⁸ and has indeed applied that standard to CARE in dismissing its past complaints in other proceedings.¹⁹ Additionally, SoCal Edison states that CARE's complaint does not clearly identify the action or inaction alleged and how that action or inaction violates applicable statutory standards or requirements, does not set forth how the action or inaction affected CARE as complainant, and does not make a good faith effort to quantify the financial impact or burden created for CARE by the challenged contract.

18. In addition, the CPUC states that while it does not seek sanctions against CARE, it does seek dismissal of these complaints and requests that CARE stops filing them, arguing that the Commission, the CPUC, and California utilities have more important matters to which they should devote time and resources. Therefore, the CPUC requests that the Commission warn CARE that if it files another complaint against the CPUC or a complaint seeking to abrogate a purchase power agreement without providing evidence as to why the rates and terms and conditions are unreasonable, then pursuant to its Rule 2102, the Commission will set for hearing the suspension of CARE's representatives from appearing or practicing before the Commission. Additionally, the CPUC states that if CARE files another complaint with the Commission, the CPUC will make such a request itself.

19. SoCal Edison and Blythe also state that CARE misapprehends the recent Ninth Circuit opinions. SoCal Edison states that CARE is mistaken when it apparently claims that *Snohomish* renders the challenged contract unjust and unreasonable. According to SoCal Edison, *Snohomish* held that, under its section 206 review of market-based rates, the Commission may only apply the *Mobile-Sierra* presumption that parties have negotiated just and reasonable rates when three preconditions have been met.²⁰ SoCal

¹⁸ In support parties cite to *Energy Mgmt. Corp. v. Peoples Gas Sys., Inc.*, 78 FERC ¶ 61,044, at 61,181 (1997); *Ill. Mun. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482-83 (1996); *Chevron Products Co. v. SFPP, LLP*, 99 FERC ¶ 61,196, at P 26 (2002).

¹⁹ See, e.g., *CALifornians for Renewable Energy, Inc. v. Calpine Energy Serv., L.P.*, 107 FERC ¶ 61,238 at 62,012 (2004); see also *CALifornians for Renewable Energy, Inc. v. B.C. Hydro and Power Auth., et al.*, 98 FERC ¶ 61,085, at 61,253-54 (2002), reh'g denied, 98 FERC ¶ 61,269, at 62,043 (2002).

²⁰ SoCal Edison describes the three preconditions as follows: (1) the contract by its own terms does not preclude the *Mobile-Sierra* review; (2) the regulatory scheme of contract formation provides the Commission with an opportunity for timely and effective

Edison states that *Snohomish* held that the Commission must find another method of evaluating whether the challenged rates are just and reasonable in the event any of the preconditions were absent, not that the absence of a precondition renders the negotiated rates unjust and unreasonable; the court remanded the cases to the Commission to accomplish just that. Therefore, according to SoCal Edison, because the Commission has not yet had an opportunity to consider the court's instructions on remand, CARE's attempt to apply its own mistaken construction of the court's holding to cases beyond those remanded to the Commission is premature.

20. SoCal Edison also states that *Snohomish* provides no bases for assuming that the challenged contract should be abrogated merely because it was negotiated under Blythe's market-based rate authority, contrary to CARE's contention that *Snohomish* dealt a fatal blow to market-based pricing. SoCal Edison and Blythe state that *Snohomish* actually held that market-based rate authority can qualify to justify the *Mobile-Sierra* review if that authority is conducted along with oversight that permits timely reconsideration in the event of a change in market conditions. In addition, Blythe argues that contrary to CARE's assertions, the Ninth Circuit confirmed that market-based rate transactions do fall within the filed rate doctrine.²¹

21. Blythe also argues that even if CARE's complaint was in compliance with the Commission's filing requirements, the complaint would be premature. It explains that under 18 C.F.R. § 35.3 (2007), the contract at issue would have to be filed with the Commission no earlier than year 2010 when the contract will take effect.

22. PG&E urges the Commission to dismiss the complaint in Docket No. EL07-49-000 in its entirety, or, in the alternative, to direct CARE to remove PG&E as a respondent and to correct misrepresentations about PG&E's contractual relationship. PG&E states that there is no basis to list PG&E as a respondent because the CPUC's December 15, 2005 decision merely allocated CDWR's contract to PG&E for operational purposes, not to enter into a power purchase contract with PG&E by assuming contractual obligations of CDWR, as CARE claims. PG&E states that it is not a party subject to the contract and has yet to be allocated any operational responsibilities.

23. CDWR states that the conclusory nature of CARE's complaint, and its lack of allegations of material facts, makes it difficult for CDWR to formally admit or deny allegations. CDWR thus state that it reserves the right to supplement its answer in the event the Commission does not dismiss CARE's complaint.

review of the contract rates; and (3) the review permits consideration of all factors relevant to the propriety of the contract's formation.

²¹ Blythe refers to *Snohomish*, 471 F.3d at 1080.

24. In its answer to the First Amended Complaint in Docket No. EL07-50-000, SoCal Edison states that CARE has failed to provide evidentiary support for the assertion that the siting of the project at issue is deficient. SoCal Edison thus concludes that CARE's amended complaint is procedurally deficient and should be dismissed. Blythe also argues that the amended complaint compounds the procedural flaws exhibited in the original complaint. In response to the amended complaint, the CPUC continues to maintain that the Commission lacks jurisdiction over the CPUC's decision and CARE's complaint fails to show otherwise.

Protests and Comments

25. Reliant states that, for the reasons set forth in the comments submitted by EPSA, Independent Energy Producers (IEP) and Reliant in Docket Nos. EL07-37-000 and EL07-40-000, the Commission should reject CARE's complaint in Docket Nos. EL07-49-000 and EL07-50-000. Reliant adds, however, that the CARE complaint is without merit and misstates the law, case precedent, and undertakes a very strained reading of Ninth Circuit decision in *Snohomish* and *CPUC*. Reliant further urges the Commission to take expeditious action in order to lay to rest any concerns about the underlying basis for its market-based rate program and the Commission's commitment to contract certainty, as well as to relieve the burden of CARE's frivolous and repetitive complaints.

26. Reliant further states that CARE's view of the Commission's market-based program and the application of the *Mobile-Sierra* doctrine would undermine the long-standing contract-based program under the FPA and effectively would rob consumers of the very benefits CARE claims it supports. While EPSA agrees that the Ninth Circuit cases are inapposite to the present matters, EPSA states that it is vitally important that the Commission either file a petition for *certiorari* itself or support the petitions filed by other parties. According to EPSA, the Commission must take this opportunity to reaffirm that: (i) the *Mobile-Sierra* doctrine continues to apply to market-based rate contracts, and (ii) the public interest test as applied to market-based rate contracts will be the same for high-rate and low-rate challenges and will provide for the "abrogation" of contracts only in extraordinary circumstances. EPSA states that reaffirmation of these points is necessary to provide sellers with the regulatory certainty required for them to continue to operate under the Commission's market-based rate program.

27. Reliant and EPSA further state that the filed rate doctrine has not been violated, as CARE alleges. Reliant states that none of the agreements at issue were required to be filed with the Commission for review. Reliant adds that CARE does not allege anywhere in its complaint that any of the sellers exercised market power in this case. Additionally, Reliant points out that each seller at issue has been found by the Commission to lack market power.

28. EPSA states that CARE's claim that market-based rate contracts must be presented in advance to the Commission to consider market conditions, reasonableness of

rates, and the functionality of the marketplace before allowing such contracts to become effective is based on a broad and misguided interpretation of the filed rate doctrine. According to EPSA, both the Commission and the courts have found that market-based rates are not “violative of the filed rate doctrine.” EPSA states that for market-based rates the Commission has explicitly found that the filing requirements of section 205(c) are satisfied through the filing of umbrella market-based rate tariffs and the quarterly reports filed by sellers.²² EPSA urges the Commission to confirm that the instant contract is just and reasonable under existing Commission precedent and practice applicable to jurisdictional companies with market-based rate authority. EPSA adds that CARE fails to demonstrate that the contract under review in its complaint is unjust and unreasonable given that the contract being challenged is still pending review at the CPUC.

Commission Determination

29. As discussed in detail below, in arguing that the Ninth Circuit “effectively gutted” the Commission’s market-based rate program, CARE mischaracterizes the Ninth Circuit’s decisions in *Snohomish*, *CPUC*, and *Lockyer*. We also disagree with CARE’s contention that under *Snohomish* and *CPUC*, market-based rate contracts enjoy no *Mobile-Sierra* price certainty, unless the contract is submitted in advance for review by the Commission. CARE also fails to present any factual support for its allegations that the challenged contracts are unjust and unreasonable. We therefore dismiss CARE’s complaints.

30. In *Lockyer*, contrary to CARE’s assertion, the court upheld the Commission’s market-based rate program, concluding that an *ex ante* finding of the absence of market power, coupled with ongoing reporting requirements, satisfies the notice and filing requirements of section 205 of the FPA.²³ Accordingly, the court did not require, as CARE claims, Commission review of market-based rate contracts prior to their effectiveness. Rather, the court disagreed with the Commission only with respect to the Commission’s finding that refunds or disgorgement of profits could not be a remedy for the reporting requirement violations.²⁴

31. In *Snohomish*, the court reaffirmed its conclusions in *Lockyer* and held that the grant of the “market-based rate authority *can* qualify as sufficient prior review to justify

²² EPSA cite to *Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247, at 62,062 (2002).

²³ *Lockyer*, 383 F.3d at 1013.

²⁴ *Id.* 1015 and 1017.

limited *Mobile-Sierra* review," provided that the Commission engage in "effective oversight permitting timely reconsideration of market based authorization if market conditions change."²⁵ The court in *Snohomish* reversed the Commission's findings because it found that the Commission failed to consider the effect of market dysfunction in determining whether the *Mobile-Sierra* presumption should apply to the contracts at issue in that proceeding, not because there was no prior review of the challenged contracts,²⁶ as CARE alleges.

32. CARE misinterpreted *Lockyer* and *Snohomish*. Contrary to CARE's contention, the court decisions did not pronounce the Commission's market-based rate program invalid.²⁷ *Lockyer* and *Snohomish* addressed a unique set of facts and a market-based rate program that has undergone substantial improvements since 2001.

33. First, it is now well accepted that the 2000-2001 energy crisis in the West was the result of a confluence of factors. These factors included: flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation.²⁸ This was not a situation in which one or a few factors stressed the market; rather, it was an unprecedented situation in which numerous adverse events occurred simultaneously to place California and the entire West in an electricity crisis that had never before been experienced.

34. Since 2001, however, the Commission has undertaken numerous measures to address market structure flaws and potential market manipulation in California markets and markets nationwide to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis. For example, in September 2006, the Commission approved the Market Redesign and Technology Upgrade (MRTU)

²⁵ See *Snohomish*, 471 F.3d at 1080 (emphasis in the original).

²⁶ *Id.* at 1086.

²⁷ Specifically, the court found in *Lockyer* that the reporting requirements were not followed and in *Snohomish* that the Commission's regulatory oversight was insufficient during the 2000-2001 energy crisis in the West. See *Lockyer*, 383 F.3d at 1014; and *Snohomish*, 471 F.3d at 1086.

²⁸ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 93 FERC ¶ 61,121(2000); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 102 FERC ¶ 61,317 (2003).

for the California Independent System Operator's markets, which will introduce, among other things, a more effective congestion management system, a day-ahead market for trading and scheduling energy, system improvements to increase operational efficiency and enhance reliability, a more transparent pricing system, and improved market power mitigation measures.²⁹ The Commission's approval of the MRTU is just one of many measures the Commission has taken to improve the California energy market since 2001.³⁰

35. The Commission's ability to respond to the instances of market manipulation during the 2000-2001 energy crisis was also limited by the minimal enforcement authority it possessed at the time. Following the crisis, the Commission initiated several investigations into potential market manipulation incidents.³¹ To deter the recurrence of market manipulation in the future, the Commission adopted the Market Behavior Rules in November 2003.³² These rules set guidelines for the conduct of sellers with market-

²⁹ *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006) (September 2006 Order), *reh'g denied in part and granted in part*, 119 FERC ¶ 61,076 (2007) (April 2007 Rehearing Order).

³⁰ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172 (2006) (accepting the CAISO tariff revisions to establish the Interim Reliability Requirements Program that will remain effective until implementation of the MRTU); *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003) (defining and prohibiting anomalous bidding behavior); *Cal. Indep. Sys. Operator Corp.*, 100 FERC ¶ 61,060 (2002) (establishing a bid cap of \$250/MWh for the California real-time energy and ancillary services markets, and also imposing a price cap of \$250/MWh for all spot market sales in the Western Electricity Coordinating Council); *San Diego Gas & Electric Co.*, 95 FERC ¶ 61,115, at 61,355-57 (2001) (implementing a must-offer obligation, beginning July 20, 2001, pursuant to which most generators serving California markets are required to offer all of their capacity in real time during all hours if it is available and not already scheduled to run through bilateral agreements).

³¹ See, e.g., *American Electric Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); *Enron Power Mktg. Inc.*, 103 FERC ¶ 61,343 (2003); *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

³² *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), superseded in part by *Compliance for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9695 (Feb. 27, 2006), FERC Stats. and Regs. ¶ 31,208 (2006).

based rate authority, and provided remedies for manipulative behavior and other market abuses by such sellers.

36. Further, the Commission sought from Congress additional regulatory tools to deter market power abuse, comparable to those possessed by other economic regulatory bodies, such as the Securities and Exchange Commission. As a result, in the Energy Policy Act of 2005 (EPAcT 2005),³³ Congress provided enhanced authority over market manipulation and market transparency, and also gave the Commission civil penalty authority to deter market manipulation and other violations of law.

37. Specifically, EPAcT 2005 added to the FPA an explicit prohibition on the use of manipulative or deceptive devices in connection with the purchase or sale of electric energy or transmission service subject to the jurisdiction of the Commission, in contravention of the Commission's rules and regulations,³⁴ expanded the Commission's ability to impose civil penalties, and increased criminal penalties for violations of Part II of the FPA or any rules or orders thereunder,³⁵ and expanded the Commission's authority to order refunds.³⁶

38. To implement the newly granted anti-manipulation authority, the Commission promptly issued Order No. 670, which adopted a new rule prohibiting the employment of manipulative or deceptive devices or contrivances in wholesale electricity and natural gas markets.³⁷ In addition, the Commission issued an Enforcement Policy Statement³⁸ to provide guidance to the industry on how the Commission intends to determine remedies for violations, including applying its new and expanded civil penalty authority.

³³ Pub. L. No. 109-58, 119 Stat. 594 (2005).

³⁴ *Id.* § 1283; *see also Id.* § 315.

³⁵ 16 U.S.C. §§ 825o, 825o-1 (2004), as amended by Pub. L. No. 109-58, 119 Stat. 594, §§ 1284(d) and (e) (2005).

³⁶ *Id.* § 824e(e), as amended by Pub. L. No. 109-58, 119 Stat. 594, §§ 1286 (2005).

³⁷ *Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,047 (2006).

³⁸ Enforcement of Statutes, Orders, Rules, and Regulations, 113 FERC ¶ 61,068 (2005).

39. In addition, in 2003, the Commission issued its Policy Statement on Electric and Natural Gas Price Indices³⁹ that explained its expectations of natural gas and electricity price index developers and the companies that report transactions data to them. This effort has resulted in significant improvements in the amount and quality of both price reporting and the information available to market participants.⁴⁰

40. The Commission has also strengthened its oversight of markets through the creation in 2001 of a separate Office of Enforcement (OE),⁴¹ which protects customers by timely identifying market problems and recommending appropriate remedies to address market problems, assuring compliance with rules and regulations, and detecting and crafting penalties to address market manipulation. Among other duties, the OE ensures the timely and accurate filing of Electric Quarterly Reports (EQR)⁴² required to be filed by all public utilities⁴³ and coordinates the work of the Market Monitoring Units (MMUs) associated with Independent System Operators and Regional Transmission

³⁹*Price Discovery in Natural Gas and Electric Markets*, 104 FERC ¶ 61,121 (2003) (Price Indices Policy Statement).

⁴⁰ Following the issuance of the Price Indices Policy Statement, the Commission held technical conferences and conducted two surveys of industry practice in price reporting. Afterwards, the Commission found that there had been an increase in the number of companies reporting data to index developers and improvements leading to increased confidence in price indices. *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*, 109 FERC ¶ 61,184 (2004). *See, also*, General Accounting Office, *Natural Gas and Electricity Markets: Federal Government Actions to Improve Private Price Indices and Stakeholder Reaction* (December 2005) (corroborating the results of the Commission's survey). The Commission continues to work to facilitate market transparency, as evidenced by its Notice of Proposed Rulemaking, *18 C.F.R. Parts 260 and 284 Transparency Provisions of Section 23 of the Natural Gas Act; Transparency Provisions of the Energy Policy Act*, 119 FERC ¶ 61,068 (2007).

⁴¹ OE was previously named the Office of Market Oversight and Investigation.

⁴² We note that the Commission has previously withdrawn market-based rate authorizations for failure to submit an EQR. *See, e.g., Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003); *Electric Quarterly Reports*, 107 FERC ¶ 61,310 (2004); *Electric Quarterly Reports*, 113 FERC ¶ 61,305 (2005); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006); *Electric Quarterly Reports*, 114 FERC ¶ 61,172 (2006); *Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006).

⁴³ 18 C.F.R. § 35.10b (2007).

Organizations.⁴⁴ The Commission's use of filed EQR data and the increased role of the MMUs in monitoring and reporting market performance are important tools the Commission uses to determine if there are indicia of the exercise of market power.⁴⁵

41. Further, the Commission's program for authorizing and overseeing market-based rates has been strengthened since 2001. This program first requires a seller seeking a market-based rate authorization to demonstrate that neither it nor its affiliates have horizontal or vertical market power (or that any such market power is sufficiently mitigated).⁴⁶ If such demonstration is made, the grant of market-based rate authorization is conditional on compliance with the applicable provisions of 18 C.F.R. Part 35, Subpart H, the quarterly filing of transaction information through the EQRs, and the filing of any change in status.

42. To clarify and improve further this program, in June 2007, the Commission issued a Final Rule on Market-Based Rates for Wholesale Sales Of Electric Energy, Capacity and Ancillary Services by Public Utilities (MBR Final Rule) amending its regulations governing market-based rate authorizations for wholesale sales of electric energy, capacity and ancillary services by public utilities.⁴⁷ The MBR Final Rule represents a significant step in the Commission's efforts to clarify and codify its market-based rate policy by providing a rigorous analysis of whether market-based rates should be granted, by including prophylactic conditions and ongoing filing requirements for all market-based rate authorizations, and by reinforcing its ongoing oversight of market-based rates.

43. All these measures taken by the Commission have strengthened the Commission's market-based rate program, its market oversight and enforcement capabilities, and its ability to impose meaningful remedies, as compared to the 2000-2001 energy crisis time

⁴⁴ See Market Monitoring Units in Regional Transmission Org. and Indep. Sys. Operators, 111 FERC ¶ 61,267 (2005).

⁴⁵ See *Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61,267 (2005) (and citations therein).

⁴⁶ The Commission also requires market-based rate sellers to satisfy affiliate restrictions, codified in the Commission's regulations, on an on-going basis as a condition of obtaining and retaining market-based rate authority.

⁴⁷ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Serv. By Pub. Util., Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007).

period. The Commission's duty is to ensure that consumers pay just and reasonable rates, and these mechanisms achieve those goals. One way the Commission protects customers is by providing rate stability through the protection of sales contracts. The failure to protect parties' contractual expectations can harm customers by reducing the willingness of sellers and buyers to contract for rate certainty through fixed-rate contracts or by deterring sellers and buyers from making the investment needed to support the long-term contracts. The Commission's improved market-based rate program provides the foundation to ensure that sellers and buyers can continue to rely on market-based rate contracts to provide price certainty, flexibility in contract terms, and the contract stability necessary to support new investment.

44. Now that we have addressed CARE's more sweeping characterizations of the Ninth Circuit's decisions, we turn to the more specific allegations that purportedly justify abrogation of the contracts at issue. Initially, CARE contends that the contracts at issue must be abrogated as unlawful due to the lack of prior review by the Commission. As explained above, however, an *ex ante* finding of the absence of market power, coupled with the EQR filing and effective regulatory oversight, qualifies as sufficient prior review for market-based rate contracts to satisfy the notice and filing requirements of FPA section 205. *Lockyer* specifically upheld our general approach to approval of market-based rates. We therefore find that there was no need to submit the contract challenged in Docket No. EL07-50-000 for prior review. In regard to the contract being challenged in the EL07-49-000 complaint, the Commission does not have jurisdiction over this contract, as discussed below in more detail.

45. CARE also alleges that the contract being challenged in Docket No. EL07-50-000 is unjust and unreasonable, but offers no specific evidence in support of this allegation. As discussed above, the Commission's current market-based rate program is accompanied by effective market oversight and other controls permitting timely reconsideration of market-based authorization if market conditions change. Because the seller under the contract at issue in Docket No. EL07-50-000 has been granted market-based rate authority, the wholesale contracts that it has entered into are presumed to be just and reasonable. CARE offers no evidence to overcome this presumption.

46. CARE also alleges that the contract at issue in Docket No. EL07-50-000 will impose a financial burden on ratepayers. We note that every contract imposes financial obligations on both parties to the contract; indeed, there would be no contract absent such obligations. CARE's complaint fails to provide any quantifiable evidence to support the allegation that the rates are unjust and unreasonable. Nor does CARE provide any factual support for its allegation that the contract poses a reliability threat. Quite to the contrary, in regard to the contract at issue in Docket No. EL07-50-000, the CPUC cited "urgent need to bring new capacity on line as soon as 2009, at least for Southern California." and directed SoCal Edison to conduct a fast track request for proposals for a total of 1,500

MW.⁴⁸ Moreover, to perform under this contract, Blythe is required to make new investments, such as the construction of a new 230 kV generation tie to interconnect with the CAISO grid and other transmission upgrades.⁴⁹ In addition, the buyer and seller under the contract at issue continue to support it. To ensure reliable and adequate service, buyers and sellers alike must be able to rely on stable long-term contracts.

47. CARE also alleges that the contract at issue in Docket No. EL07-50-000 was tainted by the exercise of market power but provides no evidence. We note that SoCal Edison has evaluated 18 bids prior to choosing Blythe's bid and did so under the auspices of the CPUC and an independent, neutral third-party evaluator. The nature of the process employed by SoCal Edison is contrary to CARE's unsupported notion that the contract at issue is the result of market power.⁵⁰ We therefore reject CARE's contention.

48. Further, CARE argues that the Commission should review the contracts at issue in Docket No. EL07-50-000, to ensure that its terms comport with the regional resource adequacy requirements. As we stated in the September 2006 Order, as a general matter, it is our responsibility to ensure that a workable resource adequacy requirement exists in a market such as that operated by the CAISO; this, however, does not mean that we must determine all the elements of such a program in the first instance. Rather, we can, in appropriate circumstances, defer to state and local regulatory authorities to set those requirements.⁵¹ In this particular case, it is the CPUC that establishes planning reserve requirements and ensures that all load-serving entities subject to its jurisdiction have adequate resources.

49. As for the contract being challenged in the Docket No. EL07-49-000 complaint, it is not clear whether CARE challenges the contract between CDWR and San Francisco or the allocation thereof to PG&E. We note that CDWR and San Francisco are state and municipal entities, respectively, over which the Commission does not have jurisdiction for the purpose of the contract at issue.⁵² We also disagree with CARE that the

⁴⁸ See CPUC's Opinion on New Generation and Long-Term Contract Proposals and Cost Allocation, Decision No. 06-07-029, at 3, 62-62 (July 20, 2006), Blythe's Answer to CARE's Complaint, Docket No. EL07-50-000, Exhibit A.

⁴⁹ *Id.* Exhibit D.

⁵⁰ See Blythe's Answer to CARE's Complaint, at 5.

⁵¹ September 2006 Order, 116 FERC ¶ 61,274, at P 111 and 1117.

⁵² As the Ninth Circuit has previously held, the Commission's refund authority does not extend to wholesale electric energy sales made by governmental entities and non-public utilities. *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).

Commission should claim jurisdiction over the contract at issue for resource adequacy purposes. The Commission's jurisdiction to direct load-serving entities, including non-public utilities, "to maintain adequate resource due to the significant and direct effect of resource adequacy requirements on jurisdictional rates and services" does not extend to the type of relief sought here by CARE.⁵³ As for the CPUC's decision to allocate costs of the CDWR-San Francisco's contract to PG&E, we find that this is not the proper forum to challenge such decisions by the state agency. We also find that the CPUC-directed allocation of the CDWR's responsibility under the CDWR-San Francisco contract to PG&E as CDWR's limited agent does not make the contract a jurisdictional sale under FPA section 205. We also note that PG&E will assume responsibilities of the buyer, CDWR, under the CDWR-San Francisco contract.

50. For the above stated reasons, we find that CARE has mischaracterized the Ninth Circuit's decisions in *Snohomish*, *CPUC*, and *Lockyer* as invalidating the Commission's market based rate program. CARE has also failed to present sufficient evidence to demonstrate that the contract in Docket No. EL07-50-000 is unjust and unreasonable or should otherwise be abrogated. In addition, we find that CARE's choice of forum to challenge the contract at issue in Docket No. EL07-49-000 is misplaced. CARE's complaints are therefore hereby dismissed. Accordingly, we also grant the motions to dismiss.

The Commission orders:

(A) CARE's complaints are hereby dismissed for the reasons discussed in the body of this order.

(B) San Francisco's, CDWR's, CPUC's motions to dismiss in Docket No. EL07-49-000, and CPUC's motion to dismiss in Docket No. EL07-50-000 are hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵³ See April 2006 Rehearing Order, 119 FERC ¶ 61,076, at P 548.